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IN THE

Supreme Court of the United States

October Term, 1979

DOCKET NO. 79-364

ROSE VIOLA NICKERSON

Petitioner,

v.

CITY OF NORFOLK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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PERTINENT PROVISIONS OF THE UNITED STATES CONSTITUTION, STATUTES OF VIRGINIA AND ORDINANCES OF THE CITY OF NORFOLK

The Respondent adopts Petitioner's statement of the pertinent provisions.

QUESTIONS PRESENTED

I. Did the City of Norfolk properly establish that the obscene material appealed to the prurient interest of the intended and probable recipients?

II. Did the trial court properly instruct the jury in accordance with Mishkin v. New York?

STATEMENT OF THE CASE

The Petitioner was tried under three (3) misdemeanor indictments charging her with possession with intent to sell three (3) obscene magazines on December 21 and 22, 1977, in the City of Norfolk, in violation of Norfolk City Code Section 31-86. The three (3) magazines were all homosexual-oriented. Petitioner was tried on August 14 and 15, 1978.

The City's principal witnesses were Investigator S. F. Auer who testified that he purchased the three (3) magazines from three (3) different bookstores owned by the Petitioner; Charles Gibson, Director of Business Licenses for the City of Norfolk, who testified that Petitioner had obtained the business licenses for the three (3) stores; and Herbert Smith, an expert on contemporary community standards in the City of Norfolk, who testified that the three (3) magazines offended Norfolk's contemporary community standard.

After the City rested its case, Petitioner moved to strike the evidence and entered a judgment of acquittal, which the Court denied. The Petitioner called three (3) witnesses who testified that the magazines did not offend Norfolk's contempory community standard. One witness also testified that the intended and probable recipients of the mazagines were homosexuals and that in his opinion the magazines did not appeal to their prurient interest.

On August 15, 1978, at the conclusion of the case, the jury returned a verdict of guilty on all three indictments, and set punishment at three thousand dollars ($3,000.00) and three (3) years in jail. Sentence was pronounced and judgment entered by the Court on November 17, 1978.

Petitioner filed a notice of appeal to the Supreme Court of Virginia on December 18, 1978. On January 9, 1979, Petitioner filed a "Petition for Appeal" in that Court.

That Court denied the appeal on April 6, 1979.

In the instant Petition for a Writ of Certiorari to this Court, Petitioner raises and argues two issues. The first is that "The City of Norfolk failed to establish that the dominant theme of the materials in issue was an appeal to the prurient interest of the intended recipients, the homosexual community of the City of Norfolk." This issue was not raised or argued by Petitioner in her "Petition for Appeal" to the Supreme Court of Virginia, and was not considered by that Court. It is argued for the first time on the instant Petition before this Court. The second issue is that "The Court failed to instruct the jury in accordance with Mishkin v. New York." This issue was raised and argued before, and considered by, the Supreme Court of Virginia.

I. THE CITY OF NORFOLK PROPERLY ESTABLISHED THAT THE MATERIAL APPEALED TO THE PRURIENT INTEREST OF THE INTENDED AND PROBABLE RECIPIENTS.

In Mishkin v. New York, 383 U.S. 502 (1966), this Court adjusted the prurient appeal requirement of the obscenity test by permitting the requirement to be met where material appealed to the prurient interest of its "intended and probable recipient group." Id. at 509.

Thereafter, this Court, in Paris Adult Theatre I v. Slayton, 413 U.S. 49 (1973) held that "expert" affirmative evidence that materials were obscene was not required when the materials "themselves were actually placed in evidence." The materials were the "best evidence of what they represent."

> 'In the cases in which this Court has decided obscenity questions since Roth, it has regarded the materials as sufficient in

> themselves for the determination of the question....' This is not a subject that lends itself to the traditional use of expert testimony.... [I]ndeed the 'expert witness' practices employed in these cases have often made a mockery out of the otherwise sound concept of expert testimony.... 'Simply stated, hard core pornography can and does speak for itself....' Id. at 56; N. 6.

The Court did, at footnote 6, reserve judgment where material, "on the extreme case... where contested materials are directed at such a bizarre deviant group that the experience of the trier of fact would be plainly inadequate to judge whether the material appeals to the prurient interest." Id.

The Petitioner argues that the instant case falls within this language, and that the trial court erred in sustaining the verdict where no expert testimony established that the materials appealed to the prurient interest of male homosexuals. This argument

fails for several reasons.

First, in the instant case, this Court is not faced with the problems suggested by the Court in Paris Adult Theatre I of reviewing materials "directed at such a bizarre deviant group that the experience of the trier of fact would be plainly inadequate to judge whether the material appeals to the prurient interest." Id. No claim has been made by the Petitioner at trial stage or before this Court that adult male homosexuals constitute a "bizarre deviant group" within our society, nor is there any evidence before the Court which would support any such contention. Petitioner concedes in her Petition that the "inclusion of homosexuals in the category of medically 'deviant' groups may no longer be accepted...." Petitioner's Brief for Certiorari at 13, Nickerson v. Norfolk (October Term, 1979). Indeed, Petitioner's own expert witness at trial testified that homosexuals, as the "probable

...viewer[s] or recipient[s] or purchaser[s] of the magazine[s]" (Tr. Vol. I, 146), were not a "deviant group":

> THE WITNESS: Yes, Your Honor. The American Psychiatric Association, the other major professional mental health associations four years ago took homosexuality, per se, out of the diagnostic category as a deviation. It's no more a deviation than heterosexuality is. If a person is unhappy being homosexual or unhappy being heterosexual, then there is a problem, but, per se, heterosexuality--homosexuality is not a deviance or a sickness. (Tr. Vol. I, 152.) (Emphasis added.)

See: People v. Young, 143 Cal. Rptr. 604 (1977).

Rather, the materials in the instant case parallel those which were before the Court in U.S. v. Wild, 422 F.2d 34 (2nd Cir., 1969), cert. den. 402 U.S. 986, 91 S.Ct. 1644, 29 L.Ed.2d 152 (1971). In Wild, the subject materials consisted of two groups of color slides, the first showing in various poses a nude male holding or touching

his erect penis, and the second portraying two nude males in the act of fellatio. As in Wild, there can be no possible claim of any value in the instant materials other than the titillation of the erotic interests of the class or group at whom they are aimed. From the nature of the materials, and from the evidence, there is no doubt as to what that class or group is, and what the materials are intended to do. Expert testimony in the instant case, as in Wild, could have done no more than restate the obvious and to that extent would have been superfluous. See: U.S. v. Young, 465 F.2d 1096 (9th Cir. 1972) for parallel holding.

Petitioner relies heavily on U.S. v. Klaw, 350 F.2d 155 (2nd Cir. 1965) in which the Court required expert testimony. While such testimony was perhaps necessary in Klaw, that case presented peculiar problems of proof not found in the instant case, nor in Wild. Klaw involved allegedly obscene

booklets containing stories, drawings, and photographs in the "bondage" genre, described to the Court as "sado-masochistic". Id. at 157. In describing the problems confronting a jury which had to judge obscenity without any evidence other than the booklets themselves, the Court stated:

> ...the jury had insufficient evidence even to 'recognize' that the material appealed to the prurient interest of the average person. It had absolutely no evidentiary basis from which to 'recognize' any appeal to the prurient interest of the deviate or the typical recipient--a class never really defined in the record. Id. at 168.

As in Wild, the class or group of recipeints in the instant case is clearly defined. The materials were sufficient bases for deciding appeal to the prurient interest of that group. See: Wild, supra, N. 1. Even if we assume in some cases that the trier of fact might be un-

qualified without the use of expert testimony to judge whether the material appeals to the prurient interest in sex, the present case is not such a case. While the average juror may not find the instant materials sexually arousing, the average juror is qualified by experience to conclude that such materials do appeal to the prurient interest of a substantial number of individuals. The materials are not directed at a "bizarre deviant group" as to require expert testimony. Paris Art Theatre I, supra; and see: State v. Grabill, 34 Or. App. 639, 579 P.2d 316 (1978); State v. Tidyman, 30 Or. App. 537, 568 P.2d 666 (1977).

Secondly, assuming arguendo that it was error not to have an expert, the only possible harm which could result from this omission would be suffered by the prosecution; not by the Petitioner. The prosecution runs the risk that some of the jurors would find

that the matter was not obscene because they were sickened or disgusted, rather than finding the material "stimulating the erotic" (Mishkin, supra, at 502, 508), because the jurors were not themselves homosexuals. People v. Young, supra.

Lastly, while the Petitioner appealed the instant conviction to the Supreme Court of Virginia, the present issue was not raised in that appeal. The highest Court of Virginia was not given opportunity to consider and rule on this matter. Hence, Petitioner has avoided a ruling from the State's highest Court and is, in effect, attempting to "bootstrap" this issue into the Supreme Court of the United States. Consequently, this Court lacks jurisdiction to review this matter by writ of certiorari. 28 U.S.C. §1257(3); Norfolk & Suburban Turnpike Co. v. Virginia, 225 U.S. 264 (1912).

II. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY IN ACCORDANCE WITH MISHKIN V. NEW YORK.

The Petitioner argues that the Court erred in improperly instructing the jury on the law concerning the prurient interest appeal to members of the intended or probable recipient group. This position is without merit.

The trial court granted Instruction No. 15 which comported with the requirements set forth by this Court in Mishkin v. New York, 383 U.S. 502, 16 L.Ed.2d 56, 86 S.Ct. 958 (1966). In Mishkin it was held that in dealing with books which appealed to "unconventional" sexual interest, the test for obscenity was met if the books appealed to the prurient interest of the members of the deviant group for whom the materials were intended. This is to be contrasted with books appealing to conventional sexual interest in which case the test is met if the book appeals to the prurient interest of the

"average" person in the community. Instruction No. 15 provided that:

> The first test to be applied in determining whether a magazine is obscene is whether the predominant theme of the magazine, when viewed as a whole and not part by part, and when considered in relation to the intended and probable recipient group, appeals to the prurient interest of the average person in the community or to the prurient interest of the members of the intended or probable recipient group.
>
> In applying this test, the question involved is not how a magazine now impresses an individual juror, but rather considering the intended probable recipient group, how the magazine would have impressed the average person or member of that group. Determination of whether the material appeals to the prurient interest must be made in light of contemporary community standards of acceptance in the representation of sex and nudity. Instruction No. 15. (Emphasis added.)

This Instruction clearly states the law as set forth in Mishkin.

Petitioner's argument that it was error for the Court to permit the jury to convict if it determined the material to appeal to the prurient interest of either the average citizen or the intended recipient is groundless. Such an agrument flies in the face of Mishkin, which stands for this very proposition. And see: People v. Young, supra, and U.S. v. Groner, 494 F.2d 499 (5th Cir. 1974).

Lastly, Petitioner argues that the Court erred because Instructions 14 and 16 refer solely to the average person. This argument fails for several reasons. First, Instructions 14 and 16 were submitted for use to the trial court by the Petitioner herself. She cannot later claim to be prejudiced by her own Instructions. Secondly, Petitioner made no timely objection to these Instructions at trial, but raised them for the first time after the verdict was rendered. Since timely objection was not made, her objection

may not be entertained on appeal. U.S.C.S. Rules of Court, Supreme Court, Rule 23(1)(f); Rule 5:21 of the Rules of the Supreme Court of Virginia; Horner v. Holt, 187 Va. 715, 47 S.E.2d 365 (1948).

CONCLUSION

The City properly established that the material appealed to the prurient interest of the intended and probable recipients:

1. The material itself was introduced into evidence, and it "can and does speak for itself." Paris Adult Theatre I, supra.

2. The intended and probable recipients are male homosexuals, and not a "bizarre deviant group." Therefore, the trier of fact requires no expert evidence on the element of prurient appeal. Id.

Further, this Court lacks jurisdiction to review this issue because the Supreme Court

of Virginia was not given an opportunity by the Petitioner to first consider it. 28 U.S.C. §1257(3).

The trial court properly instructed the jury in accordance with Mishkin v. New York, supra:

1. The trial court instructed the jury that prurient appeal must be considered in relation to the average person in the community or to the prurient interest of the members of the intended or probable recipient group. This falls squarely within Mishkin.

2. Petitioner may not attack Instructions 14, 15, and 16 on appeal because (a) they were submitted to the trial court by Petitioner herself, and (b) Petitioner made no timely objections to these instructions at trial.

For these reasons, the Respondent respectfully urges that the Petition for a Writ of Certiorari be denied and that Petitioner's conviction be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served three (3) copies of this Brief in Opposition to Petition for a Writ of Certiorari upon counsel of record for the Petitioner, Roger E. Zuckerman, Esquire, Zuckerman, Spaeder & Taylor, 1800 M. Street, N.W., Suite 375 North, Washington, D. C., 20036, pursuant to the requirements of Rule 33 of the Rules of the Supreme Court of the United States, by depositing same in a

United States mail box, with first class postage prepaid, addressed to counsel of record for the Petitioner as set forth above, on or before October 2, 1979.

I further certify that I am a member of the bar of this Court, and that all parties required to be served have been served on or before October 2, 1979.

Benjamin W. Bull

BENJAMIN W. BULL

Of counsel for
Respondent